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Promoting the rule of law and strengthening the criminal justice system

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I. Introduction

1. The present paper is intended to inform and stimulate discussion about the rule of law, with a focus on issues that are important for the development and maintenance of effective criminal justice systems. It will be seen that there are differing concepts of the rule of law and that taken broadly it covers a very wide range of legal and social issues. To permit discussion on a uniform basis, the paper therefore begins with a discussion of the nature of the rule of law and in particular those elements of greatest importance for criminal justice. It then considers the significance of the rule of law as a goal of sustainable development and as a means of supporting the achievement of other development goals. Offences involving terrorism, corruption and organized crime raise unique problems for the rule of law, and these are considered. Transnational crime, which may or may not be committed by organized criminal groups, also constitutes a new challenge to conventional models of the rule of law because the rule of law is based on a traditional framework in which sovereign powers, including those to make, enforce and administer the law, are exercised at the national level. The advent of new transportation and communication technologies creates the potential for increases in transnational crime. The reaction of the international community, and the challenges that it may face in the future, are discussed in terms of the rule of law.

II. Background

2. Discussion of the rule of law occupied criminologists during much of the latter half of the twentieth century. It was seen as a remedy for human rights abuses and, for a time, the debate between the legalities of the rule of law and socialism was a battleground of the cold war. Towards the close of the century, the rule of law became a focus for development projects, which saw it as a means of supporting the implementation of economic and human rights reforms and, on occasion, as an end in itself. Practical experience with such development eventually led to a more realistic assessment of the difficulties of developing the rule of law and to the realization that it is the rule of law in practice, and not in theory, that matters. It also led to serious questions about the nature of the rule of law not only as a legal construct, but as a much broader framework of social values and cultural beliefs that are difficult to analyse in theory and even more difficult to develop in practice.

3. The rule of law in criminal justice systems was largely overlooked in discussions about sustainable economic development and was often addressed only tangentially in discussions about the protection of human rights. The idea that rule of law reforms would generally make criminal justice systems actually work better, by making them both more effective as crime-control systems and more just and protective of human rights, has not figured prominently in the debate thus far. This is surprising, since the rule of law is arguably more important in criminal matters than in many other areas of the law.

> "The legality ideal confronts its sternest tests in the area of criminal justice. This is true for at least two reasons: First, the implications of arbitrary exertions of state power are particularly somber here because of the severity of the sanctions administrated by the criminal law and the status-degrading potency of criminal proceedings. Second, the threat of crime and the outrage it produces tempt officials to perpetrate and the public to approve carelessness toward and sometimes disregard of the legality of their efforts at crime suppression."[1]

4. To this might be added another more fundamental concern. The very nature of the criminal justice systems and sanctions makes them the ultimate instrument for turning the rule of law itself into a mechanism of repression for political, social, economic or other purposes.

III. Nature of the rule of law

5. Perhaps the most important point that must be made at the outset of any discussion of this subject is that there is no universal agreement as to what the term "rule of law" actually means. Much of what follows is a matter of fairly broad consensus, but by no means unanimous agreement. The rule of law is a system of interrelated principles that extend widely into social, economic, cultural and other structures in present-day societies. For the purposes of discussion, one must distinguish between those elements or principles which are central to the rule of law and those which are ancillary to it. At the same time, any such exercise must to some degree be arbitrary: almost every element of those structures supports the rule of law or is supported by it, or in many cases, both.

6. This is particularly true of human rights issues. Commentaries are divided as to whether human rights, individually or in general, ought to be considered elements of the rule of law or something else that may be supported by the rule of law but that are not essential to it. The present paper resolves the issue by considering rights individually. Some, such as rights relating to access to counsel, the courts and effective remedies, are directly essential to the rule of law. Others are not, although many do support the rule of law indirectly. Freedom of expression supports viable, legitimate and self-regulating structures to formulate public policy and develop legislation, for example. It must be emphasized, however, that this is more a question of degree than of distinction, and the position taken here should be regarded as the drawing of a line for purposes of discussion rather than as a fundamental statement about the nature of the rule of law.

7. A second fundamental point is that discussions often focus on elements of the rule of law to the point where the nature of the rule of law itself can be overlooked. The rule of law is a system of principles that relate to the legal governance of societies, but it is not itself primarily a legal system. In systems where it is well-developed, the rule of law is a much broader and more deeply rooted social and cultural structure. It effectively anchors and stabilizes legality, while maintaining a firm connection to social development and change, ensuring that laws and legal practices keep pace. This has profound implications for those seeking to develop the rule of law where it is absent, if it has been absent for some time or never existed to begin with.

8. The development of legal infrastructure is essential to the rule of law, but also essential, and far more difficult to develop, are social and cultural traditions of legitimacy, acceptance of legal authority and respect for law. Building new courts of law or law schools and training those who will work in them may take a few years, but the development of truly solid traditions of legality is apt to be a process spread over several generations. What might be done over the shorter term is to develop social conditions that will lead to the adoption of a rule of law tradition over time. It is also possible to provide the infrastructure needed to make the rule of law both viable and preferable to other means of governance. One must, however, be realistic in assessing goals and expectations.

IV. Some elements or requirements of the rule of law

A. The law must be comprehensive

9. The essence of judicial decision-making is that it involves the application of legal rules and not other less-tangible considerations to whatever facts are at hand. To replace purely ad hoc decision-making, the law must provide rules on which decisions can be based. The details of rule-making may vary, but the basic rules themselves must exist when called upon. Legal systems commonly incorporate legislative mechanisms that develop or adjust laws to keep pace with social changes and judicial and advisory mechanisms to interpret and apply general rules to specific situations. Underlying these are default rules that govern situations in which no other rule exists. In criminal justice systems, the principle *nulla poena sine lege*—that there be no criminal liability or punishment unless the act committed constituted an offence in law when it occurred—is an example of this.

B. The law must be clear, certain and accessible

10. Criminal law must be sufficiently clear to guide both executive and judicial decision-making. It must also be understood by the general population, which is generally presumed to know it and expected to comply with it. The drafting itself may not be clear to the average person, but it must be clear and certain enough to form the basis of commentary by others, including professional lawyers and judges. Criminal justice measures can lead to the most extreme of consequences for those accused of crimes, which requires a high degree of certainty.

11. Most people do not read statutes. They understand the laws that are relevant to their activities through commentaries and publications ranging from government and professional gazettes to the documents of interest groups and the public media, and the viability of these in providing diverse, accurate and accessible information is an important support structure for the rule of law in civil societies. Where more detailed or authoritative information is needed, professional legal counsel may be sought, and the availability and accessibility of counsel is also important, not only in proceedings but in providing general advice as well.

12. Accessibility is also a requirement for legislative and judicial proceedings. Openness and transparency in legislative proceedings supports the popular legitimacy of the legislation that results. The same is true for judicial proceedings in which precedents are set or law is made. Transparency is also important to the integrity and the perceived integrity or legitimacy of judicial proceedings in general. This requires the existence of independent and competent commentators, who must be given access to the courts and legislative proceedings, and to media that can be used to disseminate accurate information about them to the general population.

C. The law must be legitimate: consent and compliance

13. In any society, the rule of law depends on the fact that the majority of people confronted with legal rules, whether in official functions or private life, will comply with them, thereby keeping the cases of non-compliance within manageable levels. This depends to a large degree on what has been described as the "legitimacy" of the law, which in turn depends on several key factors, including:

(a) Legislative legitimacy. There must be legitimacy on the part of the lawmakers or the law will not be respected. In democratic systems, this takes the form of the political accountability afforded by periodic elections, but there may be other legitimizing factors as well. Individuals may sometimes govern successfully because of their personal popularity or religious authority, for example;

(b) Legitimacy of policy. Transparency and accessibility of the policy development and legislative process is also needed for legitimacy. The perception that those affected by a particular rule had some influence on its creation increases the legitimacy of the rule itself. Even those who disagree with a law will usually comply if there is the perception that it was arrived at after full and fair consideration of other options. A broader range of input through popular consultation, legislative study and open debate also tends to mitigate or exclude unnecessarily difficult or cumbersome rules. The open discussion of issues and options also serves to educate the population, leading to better understanding, and hence greater compliance, with the new law;

(c) Legitimacy of application. Law operates not in the abstract, but in its application to everyday situations and ordinary people. Compliance depends to a large degree not only on the legitimacy of the rule itself, but also popular belief that those who apply or enforce i with fairness, consistency and transparency. This to a broad class of public servants who apply legal a wide range of circumstances, but it is particularly in the case of elements of criminal justice systems law enforcement, prosecutors and the criminal co this sense, criminal justice systems are not only su by the rule of law, but also support it in turn. Consi example, cases in which the most powerful men society are suspected of crimes. The system relies of law elements such as equality and independ ensure that they cannot use their power to escape l At the same time, the ability of the system to dea tively with such cases protects the rule of law fro influences, such as bribery and intimidation generally such cases, if successfully concluded, s and social precedents that can strengthen the rule

(d) Legitimacy of support structures. A above, the rule of law is rooted in other element social structure, from which it draws support and s The legitimacy of legalism itself, therefore, dep some degree on the popular legitimacy of many structures as well. For example, the legitimacy of and judicial proceedings depends to a significant d the degree to which they are reported accurately media, which depends in turn on the perception media are both competent and independent of the S the proceedings themselves. Support structur within criminal justice systems are also import openness, transparency and effective governanc enforcement, prosecutorial, judicial and penal s support not only the credibility of those institut the legitimacy of the rule of law itself. In most criminal justice matters have a very high public The rule of law can be greatly reinforced damaged, depending on whether those structures as fair, independent and effective.

D. The law must balance stability and flexibility

14. Rule of law elements such as accessib legitimacy also depend to some degree on a sa balance between stability and flexibility in both law-making. If Governments change too frequent policy will be uncertain and laws will lack le Rules made by short-term Governments tend to b

driven by partisan politics rather than public policy, and those who disagree may choose not to comply if it seems likely that the Government and its policies may not last. Frequent changes also erode the ability of commentators to provide informed assessments of the law and for members of the public to understand it. Too much stability in Governments or laws, on the other hand, creates the impression that neither legislators nor legislation are still linked to the evolving needs of society. This can lead to pressure for extreme forms of political change and a widespread perception that the law is irrelevant. This can in turn lead Governments to use repressive measures to compel compliance and populations to seek out non-legal structures for governance, dispute settlement and other matters.

E. Equality before the law

15. Originally, equality before the law meant that individuals and the State must be equal before the law. This remains an important principle, but modern concepts have expanded it to encompass the general equality of everyone concerned with the law. What is important for the rule of law is that everyone should be equal before the law, regardless of power, wealth, individual or corporate status or other characteristics not directly relevant to the issues at hand. In individual-State matters, the State and its officials should be bound by their own laws, subject to the same scrutiny and sanctions for non-compliance, and stand on an equal footing with individuals in legal disputes between the two. The idea of general equality before the law has assumed greater importance in recent decades, as powerful non-State parties, ranging from multinational corporations and interest groups to transnational organized-crime groups, have emerged. Equality is essential to ensuring that legal determinations are made on the basis of legal rules as opposed to the status of the parties involved. This is needed not only for basic fairness, but also to ensure the predictability of outcomes.

16. It is important to note that equality as a rule of law concept is much more narrowly drawn than its human rights counterpart. In human rights terms, law is often seen as the means of achieving substantive equality or providing remedies for various forms of discrimination. In rule of law terms, substantive equality can be limited by the law itself, provided that the other basic requirements of legality are met. Laws that discriminate on criteria such as race, gender or religion may infringe basic rights guarantees, but they would not necessarily be inconsistent with the rule of law, provided that the discrimination was prescribed by law. This can be contrasted with cases in which a law that is not discriminatory is applied in a manner that does discriminate, which would not be consistent with the rule of law.

F. Institutional independence and the separation of powers

17. The integrity of the rule of law and legal structures is commonly protected by distributing powers among disparate actors or agencies that can then act as controls on one another. This includes judicial independence and structures such as the legislative/executive/judicial separation of powers proposed by Montesquieu and found in many modern constitutions. It also includes the separation of more mundane public administration into numerous agencies, preventing any single centre of power from achieving dominance. The rule of law is itself a form of power dispersion because it sets up legal principles as a control on social, economic or other pressures in society and vice versa.

18. The high degree of independence needed for judicial functions makes them something of a special case and warrants specific comment (see below), but it should be borne in mind that judicial independence and other forms of power dispersal are interdependent. Truly independent judicial decisions and judge-made laws require independent judges, but also independent input into the process from prosecutors, other lawyers and law enforcement agencies. The courts cannot deal effectively with cases if corruption or other undue influences on law enforcement or prosecutors prevent them from coming into court or distort evidence or argument once they are there. The independence of lawyers and the media is also important for other elements of the rule of law, notably equality in legal proceedings and access to the law through competent and independent advice.

19. The independence of judges themselves involves not only judicial employment, court and administrative practices and discipline, but also more far-reaching matters such as judicial selection, training and, increasingly, periodic retraining to keep judges abreast of relevant legal and social developments. Reasons given for the higher degree of independence accorded judges include the following:

(a) Independence helps to ensure fairness and consistency in dispute settlement and criminal prosecutions by eliminating irregular or undue influences on the process;

(b) Independence distances the judges who interpret laws from the legislative bodies that enact them and the executive bodies that administer them;

(c) Independence is needed to ensure that the courts can be effective in holding other branches of government accountable for their actions and in correcting their interpretations of the law;

(d) Independence from other branches of government is needed for objectivity in applying constitutional rules related to the separation of powers;

(e) Independence is essential for ensuring the popular legitimacy of courts, both as decision makers in settling disputes and, where judges make law, as lawmakers.

G. Legal rights as elements of the rule of law

20. Human rights in general can be distinguished from the rule of law, but some legal rights are necessary elements. Laws can govern behaviour and settle disputes only if those who have legal concerns have meaningful access to accurate information and competent advice about the law. Individuals can use the rule of law as a control on State acts only if those affected have meaningful access to the courts and effective remedies against the State. This is true of law in general, but it is particularly critical in the case of criminal law and proceedings because of the severity of the sanctions that can be imposed and the degree to which they can interfere with otherwise established basic human rights. Legal rights that are important to ensuring the rule of law in criminal justice systems include the following:

(a) The right not to be prosecuted for offences that did not exist in law when committed or that are too vague or uncertain to inform individuals as to what is a crime and what is not;

(b) The right to be informed about the nature and substance of any criminal charges and the status of criminal proceedings;

(c) The right to competent and independent counsel and, more generally, the right to mount a full and fair defence to criminal charges;

(d) The right not to be subject to arbitrary arr detention, search or seizure in the course of crim proceedings;

(e) The right of access to independent courts interim proceedings, at trial and while incarcerated order to question actions taken by the State;

(f) The right to effective remedies, inclu meaningful appeals, against the State, in interim and proceedings and while incarcerated;

(g) The right to have proceedings dealt expeditiously, in particular if liberty or other signifi interests are prejudiced or curtailed while proceeding pending or ongoing.

21. All of the foregoing are rights exercised primaril those suspected or charged in criminal cases and major significance for the rule of law is that, if the access to independent courts, they function as a for independent control on the quality of the proceedings rights of victims and witnesses, a growing concern i societies, sometimes serve a similar function. T include the following:

(a) The right of victims or other private parti lay and prosecute criminal charges in cases where the cannot or will not do so;

(b) The right of victims to monitor and to degree to participate in proceedings such as criminal plea negotiations and decisions concerning the relea suspects or convicted offenders on bail or parole;

(c) The right to security and protection from midation or retribution for having initiated or assist criminal proceedings.

V. The rule of law and development

22. Strengthening the rule of law has emerged as a of development efforts in recent years. Projects tended to focus on the relatively concrete goals of st thening legal infrastructure rather than underlying or cultural reforms. When projects have addressed inal justice systems, they have dealt with areas such training of police officials, lawyers, prosecutor judges; the equipping of those officials with resource materials ranging from uniforms and computers to houses and law libraries; the enhancement of capac develop public policy and to formulate, draft and legislation; and the enhancement of State

non-governmental capacity to disseminate legislation and informed comment on legislation. A number of lessons have already been learned from such efforts.

23. One lesson is that coherence or coordination is essential in developing individual reforms. Piecemeal reforms that alter only one element of a justice system may distort others, and in many cases no benefits can be achieved by reforms in one area without corresponding improvements in others. Ill-conceived reform packages may actually do more harm than good by damaging confidence in the system and future reform attempts. Expanding law-enforcement and prosecutorial capacity, for example, will simply generate backlogs in the courts and hardship conditions in prisons without corresponding changes in those systems.

24. When considered as comprehensive packages, the magnitude of development efforts also suggests that rule of law reforms are important as a goal in themselves and not just because they are needed to support other objectives. Rule of law projects during the 1980s and early 1990s tended to develop rule of law measures in support of either economic "sustainable development" programmes (including World Bank, Organization for Economic Cooperation and Development and bilateral development projects) or as a mechanism for the protection of basic human rights (such as United Nations projects). This raises the possibility that those involved in such projects will overlook or underemphasize aspects of the rule of law that are not essential to their own objectives.

25. Rule of law development for its own sake or reform of other areas such as criminal law may in some cases be seen as secondary to economic development, or even as an impediment to it. Human rights projects have a greater interest in criminal justice reform because of the need to protect rights in the course of criminal proceedings, but that relationship may also sometimes be an uneasy one. There is generally some tension between human rights and the effectiveness of criminal justice systems because the rights of criminal suspects are often protected by imposing substantive or procedural requirements on police and prosecutors, supported by some form of remedy for the suspect whose rights are infringed upon. In this context references to "strengthening of the rule of law" by the United Nations would probably not be seen by some in the criminal justice professions as the strengthening of criminal justice systems themselves.

26. In a larger sense, however, strengthening the rule of law does indeed strengthen criminal justice systems in several ways. Legal rights that can be asserted by suspects and offenders against the system protect other basic rights, sometimes at the cost of crime control, but such proceedings also support the system by identifying problems and generating solutions. Ways are found to conduct the business of crime control effectively within a framework of basic rule of law and human rights. The rule of law also increases the certainty and legitimacy of the law, which brings benefits in the form of greater compliance and more cooperation by witnesses and others with the police and courts. Perhaps the greatest benefit, however, is that rule of law reforms, by treating like cases alike, result in standardization in areas such as law-making, administrative and judicial interpretation of the law, law enforcement and other areas, which can greatly increase both effectiveness and efficiency.

27. Development efforts of recent years have also established that changes in legal systems alone will not bring about the rule of law in societies where the traditional or cultural values necessary to support it are not present. Legitimacy, legality and popular support for the rule of law must be developed to the point where those who are adversely affected by legal rules are unable or unwilling to resort to non-legal means. This requires openness and transparency in the formulation of public policy, the legislative process, the administration of the law and judicial proceedings. If these are present, popular confidence in the law will be established over time. Ultimately, establishing a new rule of law culture involves convincing civil society, including its most powerful members, that their best interest lies with the advantages of public security, social stability, economic prosperity and general quality of life generated by rule of law reforms.

28. The lessons learned thus far suggest several considerations for future efforts. Firstly, those involved in human rights or economic projects should also be concerned about the criminal justice effects of proposed reforms. Development projects attract corrupt influences, and reforms that increase economic activity or attract investment may also increase criminal opportunities, in some cases to an even greater extent than legitimate ones. Crime control elements can often be "built in" to such programmes, but only if the necessary rule of law infrastructure is there to support them. Changing crime patterns brought about by such reforms may also place added pressure on underdeveloped justice systems to protect the new interests while maintaining adequate standards in other areas. Changes that strengthen human rights protections should do so where possible without reducing

the effectiveness of crime control and, where such effectiveness is reduced or seen to be reduced, it is important that those involved understand the benefits that accrue in other areas. The ultimate objective should not be to achieve specific goals in terms of rights protection or crime control, but a viable balance between the two, having regard for the needs of the society involved.

29. Secondly, it is incumbent on all of those who press for the strengthening of the rule of law in any context to step back and consider the rule of law as an important social and legal structure in its own right. This is needed to ensure that elements of the rule of law are developed in balance with one another in the context of the society for which they are proposed and that nothing is left out.

30. Finally, as noted in the discussion about the nature of the rule of law above, it is important to recognize that the rule of law is much more than a legal construct, reaching into social and cultural foundations of a society for the strength needed to support the framework of the law itself. The very utility of the rule of law as a mechanism for structuring laws and social conduct and for stabilizing legality against counter-forces depends on the depth of its foundation and the care with which it is developed. In taking a comprehensive approach to rule of law projects, it is important to take into account the magnitude of the task and the fact that the reforms underlying the rule of law take time to take root in developing societies, whose members must internalize them and acquire a sense of ownership. It is necessary for both donor and developing countries to be realistic in their expectations regarding such efforts. As one recent commentary puts it "Rewriting constitutions, laws and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow."[2]

VI. The rule of law, terrorism, organized crime and corruption

31. Most conventional criminal offences do not raise significant concerns for the rule of law, but those involving organized crime, terrorism and corruption are exceptions for several reasons. Terrorism is of concern because acts are generally directed against the State or civil society and its institutions, which makes it a threat to the rule of law and many of the other social structures that support it. Acts of terrorism are not confined to "political" groups: they are also sometimes used as a tactic in support of criminal goals. There are many examples of c which conventional organized criminal groups committed violent acts for political ends or to in with the course of justice. There are also many c which groups generally regarded as terrorist in natu committed conventional crimes in order to financ activities or further their goals.

32. Upholding the rule of law and strengtheni integrity of criminal justice systems are major elem State responses to terrorism and high-profile sym State authority. This makes individuals such as ju prosecutors potential targets for terrorist groups see disrupt operations or discredit the moral authority law. More generally, random violence against other is used to demonstrate that the State cannot pro citizens everywhere and all of the time or to pro harsh reaction from the State. The inability Government to cope with terrorism through law e ment procedures within the rule of law may strengt voice of those who advocate the use of martial law extralegal methods to do so. If the Government effectively stop a terrorist campaign, there is a danger that groups of citizens will take the law in own hands.

33. Organized-crime and high-level corruption o tend to be crimes of the powerful. Those involve have both the motivation and the means to manip distort the application of law, legal proceedings a the making of laws to gain unfair advantage or t criminal liability for their offences. Where these a are pervasive or present at the highest levels in a they can neutralize or disrupt the rule of law to t where it could be said that legalism exists in name at all. Those with sufficient power or resources unnecessary to actually engage in corrupt interv because those in the justice system, having understand that there is no point in attempting to a law in such cases, do not pursue investigations prosecute charges. Victims, who normally press t to take action, may be intimidated to the point wh instead refuse to cooperate.

34. This erodes the rule of law by eroding before the law and the ability of the system to powerful and the powerless on the same legal high-profile cases, the erosion goes beyond the in case at hand and comes to represent a threat to ba imacy. Faced with the avoidance of law by the p the rest of the population either does not comply

law or complies only when credibly threatened with sanctions. Either way, broad-based compliance based on the legitimacy of social consensus and acceptance of legal rules is lost.

35. Corruption at lower levels of public administration poses a threat of a different sort. Low-level corruption, left unchecked, can spread throughout government. Here the rule of law is eroded because individual-State interactions are no longer conducted in accordance with clear and certain legal rules. Instead, interactions and outcomes are determined by unofficial and often ad hoc rules for the exchange of bribes or other considerations. This is inconsistent with many elements of the rule of law: comprehensiveness, clarity and certainty are lost because the rules being applied are no longer legal ones, but ones determined on a case-by-case basis. There is no equality because outcomes are governed by the ability to pay bribes rather than the law as it applies to each case. Procedural legitimacy is lost because the rules applied are no longer those created by the legislative process, and substantive legitimacy is lost because there is no longer a connection between the formulation of public policy and the rules that actually apply. Judicial independence is lost either because judges are susceptible to corruption by the parties in litigation or because the information they receive from other officials in the justice system, such as police or court officials, is corrupted, or both. Finally, those legal rights that are necessary elements of the rule of law (and other human rights as well) tend to be eroded because corrupt public officials, in extending the rights to those who can pay, usually withhold them from those who cannot.

36. Organized crime represents additional threats to the rule of law. It often uses corruption to distort the legal system to its own advantage, but has other means at its disposal as well. It resorts to intimidation or violence either to induce officials to do its bidding or to remove them as obstacles. Crime that is "organized" tends to be both creative and coordinated in such approaches. Those who refuse bribes may be targeted with violence, either to influence their conduct or to set examples that will make others less likely to resist. Multiple elements of the justice system may be targeted. If law enforcement investigations cannot be subverted, for example, prosecutors, judges, jurors, witnesses and anyone else who can affect the outcome of criminal proceedings may be targeted. Increasingly, organized criminals have also taken advantage of the same conditions that support global commerce to move endangered elements of their operations from jurisdictions where the rule of law cannot be avoided to places where conditions are less unfavourable.

37. Organized efforts to subvert or corrupt justice systems, if successful, represent a direct threat to rule of law elements such as equality, judicial independence and basic legality. Indirectly the same threats to basic legitimacy also arise when individual organized crime cases erode the credibility of criminal justice systems. In extreme cases organized crime can also threaten legitimacy by infiltrating the political or legislative process itself. Members of organized crime may run for elective office, for example, in order to take advantage of parliamentary or legislative immunity or to place themselves in a position to block criminal investigations or legislation hostile to organized crime. Perhaps more common are cases in which undue influences ranging from bribery to murder are used against otherwise legitimate legislators or officials to distort the formulation of public policy or the making of laws. All of these situations erode the legitimacy of laws and legal systems because policy is made in response to the interests of organized crime rather than those of the public.

VII. The rule of law and transnational crime

38. Transnational crime represents a challenge to the rule of law because the volume and diversity of such crime is increasing and because the nature of the international community poses obstacles to the rule of law that do not exist at the domestic level. Transnational crime operations are supported by the same new technologies and other developments that have supported the globalization of legitimate activities. Operations such as drug-trafficking, money-laundering and illegal migration are now supported by telephones, facsimile (fax) machines, the Internet and high-speed, affordable travel, in much the same ways as their legitimate counterparts.

39. The usefulness of such technologies and present-day dependence on them for legitimate purposes pose an additional crime control problem. While equipment or substances—such as certain drugs or firearms—used primarily by criminals can be targeted for prohibition from or restrictions on general use, any such measures applied against more widespread technologies, such as modern telephones and fax machines, high-speed broad-band telecommunications and the Internet, or policies such as

free trade or open borders cannot be used as crime control measures because the cost to legitimate interests would be too high.

40. Another problematic crime trend brought about by many of these technologies is the fact that transnational activities are no longer limited to "organized crime" in the traditional sense. New technologies are generally limited to large and affluent organizations at first, but usage becomes more widespread as the technologies become established and the costs decrease. This will make it easier for individuals to commit transnational crimes. This can already be seen in the use of telephones, fax machines and the Internet to commit fraud and other economic crimes. Computers and the Internet have also made it possible to create, conceal and transmit information that is the subject of domestic criminal offences because of its offensive content. Some of these crimes involve traditional "organized crime" but many do not, and this trend is likely to continue in the future.

41. These trends in transnational crime are problematic because new opportunities for such crime have been created and the costs and risks to offenders have generally decreased, although the costs and obstacles facing transnational investigations and prosecutions have not. The use of new technologies by large organized crime groups can be dealt with, albeit at some cost, by committing additional investigative resources to the problem and forging better systems for international cooperation in major cases. The commission of larger numbers of less serious transnational offences by individuals and smaller groups could pose a more serious problem because countries and agencies may be unwilling or unable to commit the resources required for such things as mutual legal assistance and extradition in those cases.

42. This raises a number of implications for the rule of law in criminal justice systems. In the strict sense outlined above, the rule of law does not exist as a crime control mechanism at the international level.[5] There is no international legislation that creates conventional offences and criminal procedures applicable to individuals in the same sense as domestic criminal laws do. International agreements perform a legislative function to some degree, but this is generally directed only at individual criminality after interpretation and implementation by domestic legal authorities. Governments retain the ultimate right to repudiate agreements and have the choice, subject to negotiation of reservations, to opt out of provisions they find particularly problematic. In individual cases, such things as extradition and mutual legal assistance generally subject to State discretion, which is exercised on political, not legal grounds.

43. Few if any countries could accept the e national sovereignty inherent in applying the cor rule of law elements on an international basis, have been some attempts to move in that directio agreements for the transnational control trafficking and the ongoing negotiations on a c against transnational organized crime are at ensure that pre-existing, clear, comprehensive will be available to deal with transnational offe goal is to ensure that, in dealing with a partic national crime problem, all jurisdictions have offences, that offenders cannot avoid liabilit rules are sufficiently consistent in all place offenders from choosing jurisdictions on the b lowest risks or highest potential rewards. Int standards and norms for law enforcement, prose judges also represent an attempt to ensure tha adopt relatively consistent practices with resp independence of judges and other officials, equa the law and the protection of legal and other ri criminal process.

44. These efforts are a significant step forwa are likely to face several major challenges in Firstly, while transnational crime control mecha as legal assistance and extradition are being m they are based on the assumption that caselo small compared with purely domestic prosecuti systems may be difficult to adjust if in futu proportion of crime involves transnational elem are compelling reasons why formal cooperati through central authorities, for example, but t delays and limits the volume of cases that can b without increasing resources. As new technol the commission of transnational crimes by both and groups easier, an increase in volume is like

45. Secondly, technological development ten new criminal opportunities, and hence new forn quickly and unpredictably. The fast evolution already generated pressure on domestic leg ensure that criminal laws keep pace, and the sures will arise in the international communi tionally, however, the logistical and political are greater. Where domestic legislatures usuall and reasonably efficient powers, making intern requires achieving near consensus on new meas

a large number of disparate countries. The amendment of existing measures is also more difficult and time-consuming at the international level. These factors will make it much more difficult for the international community to react quickly and collectively to new crime trends.

46. Thirdly, technological changes will generally make it easier for offenders to choose jurisdictions with relatively ineffective crime controls to conduct operations or shelter evidence or proceeds of crime from law enforcement agencies. This will place additional pressure on the international community to come much closer to unanimous agreement on crime control measures, because the lack of participation on the part of any one State may prove fatal to otherwise viable strategies. This will add further complications and delays to the process. It will also create exceptional difficulties for developing countries. Generally, those States are less likely to have the resources and technical expertise to implement transnational controls, in particular in the critical area of high-tech crime. Since the victims of such crime are most likely to be from developed countries, it may also be difficult for developing countries to justify transnational crime control measures in preference to pressing domestic issues.

Notes

[1] F. Allen, "A crisis in the criminal law? Reflections on the rule of law", *Mercer Law Review*, No. 42 (1991), p. 821.

[2] T. Carothers, "The rule of law revival", *Foreign Affairs*, vol. 77, No. 2 (1998), pp. 95-96.

[3] This is not completely accurate, given the recent efforts to establish ad hoc and permanent international criminal courts, but these efforts have been limited to the control of a small number of international crimes (war crimes and crimes against humanity) that are not relevant to the present discussion.